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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

SONNY DESPAIN,

Defendant and Appellant.

B191222

(Los Angeles County
Super. Ct. No. VA082912)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Dewey L. Falcone, Judge. Affirmed.

Edward H. Schulman for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves,
Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General,
Roberta L. Davis and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and
Respondent.

Sonny Despain (defendant) appeals from the judgment entered following a jury trial resulting in his conviction of willful, deliberate and premeditated murder with true findings that defendant used a firearm and personally discharged a firearm proximately causing death. (Pen. Code, §§ 187, subd. (a), 12022.53, subds. (b)-(d).)¹ The trial court sentenced him to an aggregate term of 50 years to life, consisting of a 25 years-to-life term for first degree murder, enhanced by a term of 25 years to life for having personally and intentionally discharged a firearm proximately causing death.

He contends that (1) the evidence of deliberation and premeditation is insufficient to support his conviction of first degree willful, deliberate and premeditated murder, (2) an erroneous jury instruction on voluntary intoxication precluded jury consideration of whether defendant's delusional thinking and paranoia resulting from his long-term and current substance abuse caused him to harbor an honest but unreasonable belief in the need to use deadly force in self-defense against the victim and of whether he acted with malice, and (3) imposing the discharge of a firearm enhancement violated principles of merger and constituted multiple punishment.

The contentions lack merit, and we shall affirm the judgment.

FACTS

I. The Prosecution's Case-in-chief

Defendant, age 18, lived with his mother, Sally Ochoa (Ochoa), and his grandmother, Lilia Alvidrez (Alvidrez), in a two-bedroom apartment in Los Angeles County. The women occupied their respective bedrooms, and defendant slept in a bed in the living room. Defendant was a Florencia 13 gang member with numerous gang tattoos on his face and neck. According to defendant, his then girlfriend, the victim Iracema Guzman (Guzman), was also a Florencia 13 gang member. Defendant and Guzman had an on-and-off relationship. For two weeks prior to May 17, 2004, she had been visiting him almost every day.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

On May 16, 2004, Guzman did not come by for a visit. However, at about 6:30 p.m. on May 17, 2004, she arrived to see defendant. During most of Guzman's visit with defendant that day, at various locations in the apartment, the couple talked, laughed, kissed, and hugged. Just prior to 8:00 p.m., defendant started an argument. Alvidrez claimed that she heard the couple arguing about Guzman's absence the prior afternoon.² Alvidrez heard defendant ask Guzman, "[W]ere you with somebody else or something?" and he accused her of being a liar. Alvidrez saw defendant standing with a rifle in the living room. That was the first time that she had seen him with the rifle that day. Alvidrez said that she had quickly entered her bedroom to avoid defendant "turn[ing] that thing on me."

Shortly after the shooting, Ochoa told the deputies that she saw defendant pacing the living room in a jealous rage. He had obtained a rifle several days before May 17, 2004, or she had seen the rifle that morning laying on his bed. She told him to get rid of it. Later, she did not see the rifle, but he was wearing his poncho, which may have covered the rifle. Ochoa also said that defendant had put the poncho on and then removed it several times during Guzman's visit. During the argument, Guzman was standing at the apartment's front door repeatedly saying, "Let me go. I wanna go." Ochoa testified that Guzman was giggling, and it sounded as if Guzman was deliberately attempting to make defendant angry. Guzman told defendant that if she left, she would not be back.

Ochoa interrupted the argument and told defendant to let Guzman alone and to let her leave. Defendant did not respond. Ochoa walked into her bedroom. Several minutes later, a shot rang out. Ochoa and Alvidrez entered the living room and saw defendant standing over Guzman. Guzman was slumped on the floor and bleeding. They asked

² Alvidrez and Ochoa made several statements to the deputy sheriffs and the detective when they responded after the shooting. At trial, Ochoa and Alvidrez recanted these statements. They were impeached.

defendant what he had done, and defendant replied that he did not know and that he had shot her.

Defendant looked nervous and panicky and put the rifle down in the laundry room. He removed the poncho or changed his shirt and ran out the front door. Ochoa quickly hid the rifle in the back yard to prevent defendant from returning and using the rifle on her and Alvidrez.³

Defendant was gone overnight. The following morning, at 4:45 a.m. on May 18, 2004, a deputy saw defendant walking home near the apartment and arrested him. At trial, defendant claimed that he was wandering around Los Angeles that night and described the locations he had visited. He said that he had gone to a bus depot and contemplated going to Mexico, but he did not have enough money. At another location in East Los Angeles, he telephoned 911 purportedly to turn himself in. He told the 911 operator that he made a mistake and shot Guzman by accident. Then he told a deputy

³ The deputies had Ochoa show them the rifle she had hidden in the back yard, a .22-caliber model 77 Winchester long semiautomatic rifle. Its stock had been cut down approximately nine inches, and it held 16 rounds of ammunition in its magazine. At trial, a firearms examiner explained that the rifle discharged bullets one at a time by pulling the trigger, but the rifle was designed to automatically reload a bullet from the magazine into the chamber. To start the semiautomatic action of the rifle, the first bullet in the magazine had to be loaded into the chamber by bolt action. Also, before the weapon was discharged, a safety catch had to be released. This particular rifle's feeding mechanism was malfunctioning. That caused the rifle to jam after the initial bullet in the chamber was discharged. The jammed bullet would float outside the chamber and not load properly. To reload the gun for firing, the floating bullet had to be removed from the rifle. The floating bullet could only be removed by jockeying the bullet around and out the ejection chamber. Once that was done, the rifle could be again fired after loading yet another bullet in the chamber by bolt action and then pulling the trigger.

When the deputies inventoried the shooting scene, they found one unexpended and one expended .22-caliber shell on the floor of the apartment's living room. The firearms examiner opined that the expended shell had been discharged from the rifle. In the opinion of the firearms examiner, the live round could have been cycled through the rifle. However, the most he could say was that that unexpended shell lacked the individual characteristics to positively identify it as having been cycled through the rifle.

who came on the line that he had had a “little argument” with his girlfriend and that he had shot her. When the deputy attempted to ascertain his location, defendant hung up.

Upon defendant’s arrest, deputy sheriffs observed that his demeanor was normal, although one deputy had a vague recollection that defendant was nodding off to sleep.

The deputy medical examiner testified that Guzman died from a gunshot wound to the rear right side of her head. The bullet impacted Guzman about four and three-fourths inches behind her right ear canal. The bullet’s trajectory was back to front and right to left. After the shooting, Guzman was found slumped in a corner at the front door against the entertainment center and the wall.

During the deputies’ initial interviews with Ochoa and Alvidrez, the women never mentioned that they were concerned that defendant was high or under the influence of a drug. They also failed to mention their later claims that defendant had repeatedly said that he wanted to commit “suicide by cop.”

II. The Defense

Defendant testified and made conflicting statements about having an argument with Guzman. Eventually, he admitted that there had been an exchange of words. Essentially, he claimed that he was talking with Guzman and shot her in self-defense.

He explained that for several years, he had been using “glass,” a form of crystal methamphetamine, which he injected and sniffed daily. He said that 20 to 30 minutes before the shooting, he had injected half a gram privately in a back room of the apartment. Then, he set out several lines of methamphetamine that he and Guzman sniffed together. He claimed that he had been using methamphetamine all day before Guzman’s 2:00 to 3:00 p.m. arrival. He claimed that he was “under the influence” when he shot Guzman and his mind was going a “million miles per hour.” He even believed that his mother was “in” on shooting him.

He made another claim that for two years he had been trying to get out of his gang. For the last two years, he had stopped associating with the other gang members. He stayed at home alone all the time. Some of his former gang members beat him up when

they encountered him. He claimed that leaving his gang can cost your life.⁴ Defendant said that, lately, he had been afraid that members of his gang were always after him. For example, on April 29, 2004, he had telephoned the police because gang members with laser targeting devices had been shining their lasers into the windows of his grandmother's apartment. He telephoned the police to report the intrusion. His mother told the deputies that he was hallucinating, and the deputies drove him to the Augustus F. Hawkins Mental Health Center at Martin Luther King Hospital (Augustus Hawkins). He stayed there overnight until the effects of the methamphetamine wore off. He then started "think[ing] right" and he came home.

After his release from Augustus Hawkins, for the 18 days preceding the shooting, he used methamphetamine daily, consuming approximately \$50 worth of methamphetamine every day. (He claimed that his mother and grandmother gave him the \$50 a day that it took to support such drug use.) He did not sleep or eat for nine days. He was afraid that gang members would shoot him, and he borrowed a .22-caliber rifle from a tagger friend and purchased shells for it. He kept it with him fully loaded as he wanted to be ready to shoot them before they shot him.

When Guzman arrived to visit, she wanted a cigarette. He gave her money to go to the store alone to purchase them. After she returned, they talked in the living room and took a short walk and smoked a cigarette. Throughout the visit, he carried his rifle under his poncho. Immediately before the shooting, they were talking near the front door. Carrying his rifle, he walked toward the kitchen. As he walked, he recalled that Guzman was a Florencia 13 gang member, and when she went to the store, she was gone slightly longer than was necessary to purchase the cigarettes. He started wondering whether she had stopped and obtained a gun from one of his homeboys. He and Guzman exchanged words, and he said to her several times, "So [are] you going to [kill me] for

⁴ Detective Scott Fines agreed that a youth who attempted to stop participating in a criminal street gang was engaged in "risky business."

my neighborhood?” referring to his gang. At this point, he believed that she had obtained a gun and was “coming to kill [him].”

Guzman called him “stupid” and said he was “tripping,” referring to his drug use. At the same time, she turned to face him and reached under her shirt to the area of her waistband. He claimed that at that time her shirt covered the top of the shorts. (There was other evidence that her shirt did not cover her midriff.) Defendant concluded that she was reaching for a gun in order to shoot him, and he shot her before she could shoot him. After she fell, he ran over to her to grab the gun from her shirt to prevent her from using it against him. There was no gun. He panicked and ran.

During defendant’s cross-examination, the prosecutor impeached him on any number of small points. The prosecutor pointed out that prior to, during, and after the shooting, defendant had engaged a lot of rational, goal-oriented conduct, which disproved impairment. The prosecutor questioned defendant’s claim that he was carrying the rifle with him everywhere that day, that he was paranoid, and that there was any truth to the claim that he had stopped participating in the gang.

Defendant admitted that he had juvenile adjudications for automobile theft and joyriding. He also admitted that he had read about voluntary manslaughter and had spoken to his mother about his defense.

Ochoa corroborated defendant’s claim of chronic “glass” use, that defendant no longer participated in the gang, and that he had come home beaten up. She claimed that after 1998 when his grandfather died, defendant suffered depression, that he was suicidal, and that he had been diagnosed as bipolar and prescribed medication. She said that he always carried a gun or a toy gun and believed that someone was going to shoot him. During the five days preceding the shooting, defendant appeared to be “a little hyper,” leading Ochoa to conclude that defendant was using methamphetamine. She said that he had not eaten or slept for the five days preceding the shooting. Also, he exhibited paranoia, as he believed that someone was coming to get him when she saw no evidence that people were lurking around their residence attempting to hurt him. Ochoa asserted

that at the time of the shooting, defendant was under the influence and that “[h]is mind [was not] there.”

Ochoa acknowledged that she had an uncle who was acquitted of murder based on self-defense and that she had spoken to her brother about defendant’s legal situation. She denied that she had researched voluntary manslaughter or discussed such issues with defendant. When Ochoa was asked whether defendant and Guzman engaged in arguments and violence, Ochoa replied that Guzman hit defendant, and “they would whack each other around.” She said that she had concluded that Guzman deliberately pushed defendant’s “button[s].”

A psychiatrist, Dr. Marshall Cherkas, testified for the defense. Inter alia, he said that he had reviewed the August Hawkins medical records. They showed that defendant was a long-term drug abuser who was without sleep for days before his April 29, 2004, admission. During the evaluation, defendant admitted chronic drug use, but he had denied delusions and preoccupations. He claimed homicidal ideation, and the records contained nothing about defendant being afraid that someone was going to hurt him.

Dr. Cherkas explained that methamphetamine is a stimulant producing adrenalin in the brain. It can cause a user to stay awake for extended periods of time. Three years of methamphetamine abuse increased the possibility of paranoid ideation, i.e., an abnormal fear that others were out to hurt a person. The doctor gave his opinion that a chronic methamphetamine user with sleep deprivation, who additionally suffers paranoid ideation, would be likely to misinterpret things said to him during an argument. Such a person might act impulsively and without exercising adequate judgment.

The prosecutor questioned Dr. Cherkas about defendant’s claim during his evaluation that he had been awake on methamphetamine for three weeks before the shooting. The doctor replied that the claim was necessarily untrue as no one can go without sleep that long.

DISCUSSION

I. Sufficiency of the Evidence

Defendant contends that the record is “[w]oefully [d]eficient” of evidence supporting the jury’s verdict that the murder was committed willfully, deliberately, and with premeditation. The contention lacks merit.

A. *Standard of Review*

Our review of the sufficiency of the evidence is deferential. We “review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” [Citation.]” (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496; *People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 681.) We focus on the whole record, not isolated bits of evidence. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1203.) We presume the existence of every fact the trier of fact reasonably could deduce from the evidence that supports the judgment. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We will not substitute our evaluations of a witness’s credibility for that of the jury. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1078; accord, *People v. Smith* (2005) 37 Cal.4th 733, 738-739.)

B. *The Analysis*

Defendant’s argument is as follows. Defendant had a well-documented history of methamphetamine abuse and of mental illness, including paranoid and delusional thinking. He was intoxicated at the time of the shooting. With that background and the present record, his conduct during the shooting cannot reasonably be characterized as the product of a mindful or reasoned weighing and consideration of the question of whether or not to kill with a clear understanding of the consequences of that action. Or, stated differently, the evidence demonstrates merely that defendant’s decision to shoot was unpremeditated, and a rash and impulsive shooting, committed without careful consideration. He argues that when all the evidence is considered, not just that relied on

by the prosecution, the evidence is insufficient to sustain his conviction of willful, deliberate, and premeditated murder.

“A murder that is premeditated and deliberate is murder of the first degree. (§ 189.) ‘In this context, “premeditated” means “considered beforehand,” and “deliberate” means “formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.”’ (*People v. Mayfield*, [(1997)] 14 Cal.4th [668,] 767.) ‘An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse.’ (*People v. Stitley* [(2005)] 35 Cal.4th [514,] 543.)” (*People v. Jurado* (2006) 38 Cal.4th 72, 118-119.)

When confronted with the above contention, a reviewing court normally considers three kinds of evidence to determine whether a finding of premeditation and deliberation is adequately supported -- preexisting motive, planning activity, and manner of killing -- but “[t]hese factors need not be present in any particular combination to find substantial evidence of premeditation and deliberation.” ([*People v. Stitley* [, *supra*,] 35 Cal.4th at p.] 543; see also *People v. Combs* [(2004)] 34 Cal.4th [821,] 850; *People v. Silva* [(2001)] 25 Cal.4th [345,] 368.)” (*People v. Jurado, supra*, 38 Cal.4th at pp. 118-119.)

The contention lacks merit. Here, there was evidence of motive. Ochoa and Alvidrez had told the deputy sheriffs that immediately prior to the shooting, defendant was arguing with Guzman, and he was angry and jealous. Guzman had not visited defendant the prior afternoon. Defendant accused Guzman of having been with another man and called her a liar. Defendant told her that she could not leave and then apparently shot her when she turned to go out the front door. Such trial evidence supports a jury conclusion that the shooting was motivated by defendant’s anger and jealousy and by his need to control Guzman.

The evidence showed planning. One reasonable interpretation of the evidence was that defendant had armed himself with the rifle just before or during the argument, which shows a preconceived design. Alvidrez claimed that on the afternoon in question, she

saw defendant with the rifle only when the argument started, and she had seen him earlier that day. Ochoa claimed that defendant took his poncho off and on during Guzman's visit, and defendant had his poncho on just before the shooting. The poncho could have covered the rifle. The reasonable inference from the testimony was that defendant was not armed earlier in the afternoon and armed himself during the argument. Also, there were preparatory acts to discharging the rifle that presumably had to be performed before defendant shot Guzman. At a bare minimum, the safety catch on the rifle had to be released before the rifle could be discharged. Ochoa said that she had interrupted the argument minutes before the shooting in order to tell defendant to let Guzman go home. That interruption gave defendant time for reflection before he discharged the rifle several minutes later. During his testimony, defendant did not explicitly claim that the shooting was rash or impulsive.

Further, Dr. Cherkas testified that the medical records from Augustus Hawkins indicated that as early as April 29, 2004, defendant was engaged in homicidal ideation. That testimony indicates that defendant had been thinking about killing someone for some time.

The manner of shooting supported the jury verdict. Defendant shot Guzman in the back of the head where the wound would be lethal, presumably as she started to depart in defiance of his direction. Defendant testified that he shot Guzman from about six feet away. This manner of killing shows a well-aimed shot designed to be fatal, and further supports the verdict.

Consciousness of guilt evidence further made it appear that the imperfect self-defense claim was invented after the fact to save defendant from the life term warranted for a killing committed with premeditation because of unfounded jealousy.

This trial evidence afforded the jury the discretion to decide which of defendant's claims, if any, were true and to determine whether the killing was calculated, or on the contrary, committed without deliberation and premeditation. The evidence supports the jury's verdict of first degree murder.

II. The Jury Instructions

Defendant contends that the trial court's modified jury instruction based on a pattern instruction, CALCRIM No. 625, improperly limited the jury's consideration of voluntary intoxication with respect to whether he acted with express malice aforethought. He claims that the misinstruction amounts to prejudicial federal constitutional error. In the alternative, he asserts ineffective trial counsel, claiming that his trial counsel failed to request "appropriate instructions" to support defendant's claim of mental illness and/or voluntary intoxication.

We are not persuaded.

A. Background

The trial court charged the jury with respect to murder and as to lesser included offenses of voluntary manslaughter and involuntary manslaughter. The trial court told the jury that malice aforethought was a necessary element of murder and defined malice aforethought. It informed the jury that malice was absent where a defendant kills upon a sudden quarrel or in the heat of passion with adequate provocation. It charged the jury that if defendant killed unreasonably in self-defense (imperfect self-defense), defendant was guilty of voluntary manslaughter. In addition to setting out the elements of voluntary manslaughter on a theory of imperfect self-defense, it gave the jury the following pinpoint instruction. It said that if defendant "believed that Iracema Guzman had a gun, [defendant] did not have the specific intent or mental state required" for murder. The trial court informed the jury that if it had a reasonable doubt that defendant had the specific intent or mental state required for murder, it had to find him not guilty. Also, the trial court charged that the People had the burden of proving beyond a reasonable doubt that defendant was not acting in imperfect self-defense and that if the People have not met this burden, the jury had to find the defendant not guilty of murder.

The trial court gave the following instruction on voluntary intoxication, which was based on a modified version of CALCRIM No. 625: "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider

that evidence only in deciding whether the defendant acted *with an intent to kill, or the defendant acted with deliberation and premeditation*. [¶] A person is voluntarily intoxicated if he becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. [¶] You may not consider evidence of voluntary intoxication for any other purpose.” (Italics added.)⁵

The trial court also instructed with respect to a mistake of fact. It struck the requirement in the pattern instruction that the mistake of fact had to be reasonable.

During final argument, trial counsel conceded that implied malice and involuntary manslaughter were not at issue, and he asked the jury to return a verdict of voluntary manslaughter. During their arguments, the prosecutor and trial counsel agreed that the issues in the case boiled down to a matter of witness credibility. If the jury believed that defendant was impaired and that he had actually believed that Guzman had the gun, defendant was guilty only of manslaughter.

The prosecutor argued defendant’s lack of credibility and that there was no sudden quarrel/heat of passion because there was no provocation. She urged that there was malice and that the murder was deliberate and premeditated because defendant had admitted that he shot Guzman intentionally in self-defense. She argued that the physical evidence showed that defendant shot Guzman in the back of the head, probably as Guzman attempted to leave the apartment. Guzman was not shot as she faced defendant as he claimed in his testimony.

⁵ Trial counsel submitted to the trial court another instruction, CALCRIM No. 627, on the effect of hallucinations on deliberation and premeditation. That pattern instruction also contained no direction with respect to malice aforethought. The trial court commented that the instruction was repetitive of its other instructions, and trial counsel said that “it never hurts to emphasize” that voluntary intoxication can negate specific intent. The trial court declined to charge the jury with CALCRIM No. 627.

Trial counsel replied that the trial evidence presented a classic case of heat of passion. In the alternative, trial counsel claimed impairment as the defendant had psychological problems and he was affected by his chronic drug use. At the time of the shooting, on top of having used methamphetamine, defendant was operating with sleep deprivation and with a paranoid state of mind. Trial counsel admitted that, in reality, Guzman probably did nothing to threaten defendant. However, defendant's brain was rushing from his methamphetamine use, and he was afraid that people out there wanted to shoot him. In his mind, defendant actually and honestly believed that Guzman had reached for a gun. Defendant thus believed that he was in immediate danger, and for that reason, he was justified in using deadly force. Trial counsel asserted that defendant was guilty of voluntary manslaughter because he honestly believed that Guzman was going to shoot him, and he acted unreasonably in self-defense.

B. The Relevant Legal Principles

1. Murder and Voluntary Manslaughter

“Murder is the unlawful killing of a human being with malice aforethought. (. . . § 187, subd. (a).) Malice may be either express or implied. It is express when the defendant manifests ‘a deliberate intention unlawfully to take away the life of a fellow creature.’ (§ 188.) It is implied . . . ‘when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life’ [citation].” (*People v. Lasko* (2000) 23 Cal.4th 101, 107, fn. omitted (*Lasko*).)

“Manslaughter is ‘the unlawful killing of a human being without malice.’ (§ 192.) A defendant lacks malice and is guilty of voluntary manslaughter in ‘limited, explicitly defined circumstances: either when the defendant acts in a “sudden quarrel or heat of passion” (§ 192, subd. (a)), or when the defendant kills in “unreasonable self-defense” -- the unreasonable but good faith belief in having to act in self-defense (see *In re Christian S.* (1994) 7 Cal.4th 768 (*Christian S.*); *People v. Flannel* [(1979)] 25

Cal.3d 668).’ (*People v. Barton* (1995) 12 Cal.4th 186, 199.)” (*Lasko, supra*, 23 Cal.4th at p. 108.)

“‘An intentional, unlawful homicide is “upon a sudden quarrel or heat of passion” (§ 192(a)), and is thus voluntary manslaughter (*ibid.*), if the killer’s reason was actually obscured as the result of a strong passion aroused by a “provocation” sufficient to cause an “ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than [from] judgment.”’” (*People v. Breverman* (1998) 19 Cal.4th 142, 163.) No specific type of provocation is required, and ‘the passion aroused need not be anger or rage, but can be any ““[v]iolent, intense, high-wrought or enthusiastic emotion””’ [citations] other than revenge [citation].’ (*Ibid.*) Thus, a person who *intentionally* kills as a result of provocation, that is, ‘upon a sudden quarrel or heat of passion,’ lacks malice and is guilty not of murder but of the lesser offense of voluntary manslaughter.” (*Lasko, supra*, 23 Cal.4th at p. 108.) ““[H]eat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances.”” (*People v. Cole* (2004) 33 Cal.4th 1158, 1215.) Heat of passion must be due to sufficient provocation. Provocation is inadequate where a couple has a several-year relationship punctuated with excessive drinking and fighting, which sometimes turns to violence, and one party kills the other in anger during one of these arguments. (*Id.* at p. 1216.)

“A person who *intentionally* kills in unreasonable self-defense lacks malice and is guilty only of voluntary manslaughter, not murder. [Citations.]” (*People v. Blakeley* (2000) 23 Cal.4th 82, 88 (*Blakeley*).) The court in *People v. Flannel* (1979) Cal.3d, 668 explained imperfect self-defense. “‘An honest but unreasonable belief that it is necessary to defend oneself from imminent peril to life or great bodily injury negates malice aforethought, the mental element necessary for murder, so that the chargeable offense is reduced to manslaughter.’” (*People v. Flannel, supra*, 25 Cal.3d at p. 674, italics omitted; see also *In re Christian S.* [, *supra*,] 7 Cal.4th 768, 773.)” (*People v. Rogers* (2006) 39 Cal.4th 826, 883 (*Rogers*).) The doctrine “is ‘narrow’ and will apply only when the

defendant has an actual belief in the need for self-defense and only when the defendant fears immediate harm that “‘*must be instantly dealt with.*’” (*In re Christian S.*, *supra*, 7 Cal.4th at p. 783.)” (*Rogers*, *supra*, 39 Cal.4th at p. 883.)

“[I]mperfect self-defense is not an affirmative defense, but a description of one type of voluntary manslaughter.” (*People v. Manriquez* (2005) 37 Cal.4th 547, 581.) “Malice exists, if at all, only when an unlawful homicide was committed with the ‘intention unlawfully to take away the life of a fellow creature’ (§ 188), or with awareness of the danger and a conscious disregard for life (*ibid.*; *People v. Whitfield* (1994) 7 Cal.4th 437, 450; see also *People v. Watson* (1981) 30 Cal.3d 290, 300 [‘wanton disregard for human life’]). In certain circumstances, however, a finding of malice may be precluded, and the offense limited to manslaughter, even when an unlawful homicide *was* committed with intent to kill. In such a case, the homicide, though not murder, can be no less than voluntary manslaughter.” (*People v. Rios* (2000) 23 Cal.4th 450, 460, fn. omitted.)

“‘Generally, the intent to unlawfully kill constitutes malice. (§ 188; *People v. Saille* (1991) 54 Cal.3d 1103, 1113; see *In re Christian S.* (1994) 7 Cal.4th 768, 778-780.) “But a defendant who intentionally and unlawfully kills [nonetheless] lacks malice . . . when [he] . . . kills in ‘unreasonable self-defense’” [Citations.]” (*People v. Rios*, *supra*, 23 Cal.4th 450, 460-461, fn. omitted.) “*Imperfect self-defense* obviates malice because that most culpable of mental states ‘cannot coexist’ with an actual belief that the lethal act was necessary to avoid one’s own death or serious injury at the victim’s hand. [Citations.]” (*Id.* at p. 461.)

“An unlawful homicide committed with malice is murder, whether or not the killer harbors the intent to kill.” (*Blakeley*, *supra*, 23 Cal.4th at p. 89.) Murder includes, but manslaughter lacks, malice aforethought. Heat of passion and imperfect self-defense are alternative means of raising a doubt about the element of malice. Therefore, although malice and the intent to unlawfully kill are generally one and the same, malice is narrower, implying intent combined with an absence of the factors that would reduce the

killing to manslaughter. (*People v. Wright* (2005) 35 Cal.4th 964, 981, conc. opn. of Brown, J., characterizing the court’s decision in *People v. Rios*, *supra*, 23 Cal.4th at pp. 460-462, 469.)

2. Voluntary Intoxication and Mental Disease or Disorder

“Evidence of voluntary intoxication, formerly admissible on the issue of diminished capacity (see generally *People v. Mendoza* (1998) 18 Cal.4th 1114, 1125), now is ‘admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought.’ (§ 22, subd. (b); see *People v. Mendoza*, *supra*, at p. 1126.)⁶ Accordingly, a defendant is entitled to an instruction on voluntary intoxication ‘only when there is substantial evidence of the defendant’s voluntary intoxication and the intoxication affected the defendant’s “actual formation of specific intent.”’ (*People v. Williams* (1997) 16 Cal.4th 635, 677.)” (*People v. Roldan* (2005) 35 Cal.4th 646, 715.)⁷

⁶ Section 22 provides, as follows: “(a) No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in that condition. Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. [¶] (b) Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, *or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought.* [¶] (c) Voluntary intoxication includes the voluntary ingestion, injection, or taking by any other means of any intoxicating liquor, drug, or other substance.” (Italics added.)

⁷ Although not pertinent here, as during final argument trial counsel conceded that defendant acted with express malice, it should be noted that the Court in *People v. Boyer* (2006) 38 Cal.4th 412, 469, footnote 40, said the following: “[D]efendant’s voluntary intoxication, even to the point of actual unconsciousness, [will] not prevent his conviction of second degree murder on an implied malice theory, or of voluntary manslaughter based on his or her potentially lethal act, committed with ‘conscious disregard’ for life, in response to provocation or as the result of an honest, though unreasonable, belief in the need for self-defense. [Citations].”

“The essence of a showing of diminished capacity is a “showing that the defendant’s mental capacity was reduced by *mental illness, mental defect or intoxication.*” (*People v. Berry* [(1976)] 18 Cal.3d [509,] 517.) However, the Legislature *abolished* the defense of diminished capacity before defendant committed this crime. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1013-1014; *People v. Saille* [, *supra*,] 54 Cal.3d [at p.] 1114.) Only diminished *actuality* survives, i.e., the jury may generally consider evidence of voluntary intoxication or mental condition in deciding whether defendant actually had the required mental states for the crime. (*People v. Saille, supra*, 54 Cal.3d at p. 1116; but see current § 22, subd. (b); *People v. Castillo, supra*, 16 Cal.4th at p. 1014 & fn. 1.)” (*People v. Steele* (2002) 27 Cal.4th 1230, 1253, fn. omitted.)

“There is no malice aforethought if the evidence shows that due to diminished capacity caused by mental illness, mental defect, or intoxication, the defendant did not have the capacity to form the mental state constituting malice aforethought, even though the killing was intentional, voluntary, deliberate, and unprovoked.” (*People v. Ledesma* (2006) 39 Cal.4th 641, 717, quoting from CALJIC No. 8.41.)⁸

3. The Trial Court’s Duty to Instruct

A “trial court must instruct on a lesser included offense if substantial evidence exists indicating that the defendant is guilty only of the lesser offense. (*People v. Breverman, supra*, 19 Cal.4th 142, 162.)” (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.) “[W]ith the abolition of the voluntary intoxication/diminished capacity doctrine in 1981 (see § 22), trial courts no longer must give sua sponte instructions regarding the

⁸ In pertinent part, section 28 provides: “(a) Evidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required *specific intent, premeditated, deliberated, or harbored malice aforethought*, when a specific intent crime is charged.” (Italics added.)

actual effect of the defendant's voluntary intoxication on his relevant mental state, such as specific intent, premeditation, or deliberation. (See also *People v. Castillo* [, *supra*,] 16 Cal.4th [at p.] 1014.) Instead, these instructions are more in the nature of pinpoint instructions required to be given only on request where the evidence supports the defense theory. (*Ibid.*; *Saille, supra*, 54 Cal.3d at p. 1119.) By similar reasoning, sua sponte instructions on the actual effect of the defendant's mental disease or disorder on his relevant mental state became unnecessary with the abolition of the mental disease/diminished capacity doctrine. (§ 28, subd. (a).)" (*People v. Ervin* (2000) 22 Cal.4th 48, 90-91.)

C. The Analysis

Defendant argues that the modified CALCRIM No. 625 instruction was incorrect as it failed to inform the jury that it could consider voluntary intoxication on the issue of whether defendant acted with malice aforethought. We address the contention on its merits to forestall defendant's claim of ineffective trial counsel. (See *People v. Norman* (2003) 109 Cal.App.4th 221, 229-230.)

In the abstract, the modified CALCRIM No. 625 instruction was an incorrect statement of law. Section 22 is explicit. In a murder prosecution, the jury can consider voluntary intoxication on the issues of whether a defendant harbors express malice aforethought, as well as to whether he has deliberated and premeditated murder. However, "[t]he correctness of [a] jury instruction[] is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." [Citation.]" (*People v. Harrison* (2005) 35 Cal.4th 208, 252.) At the trial in this case, the trial court and the parties treated the entire issue of the diminished actuality, mental disease, and voluntary intoxication as one issue of voluntary intoxication. Apparently, the parties and the trial court concluded that although the paranoia was caused by long-term drug use, in defendant's case, his paranoia arose only when he was under the influence of methamphetamine. Consequently, the voluntary intoxication instruction was sufficient to cover the entire issue of diminished actuality. The parties

apparently agreed that if defendant acted unreasonably in self-defense based on delusion, defendant was guilty of manslaughter, and the trial court gave a pinpoint instruction on that very issue. No one seemed to focus on the issue of whether defendant, who was acting on the basis of a delusion not grounded in reality, was actually entitled to voluntary manslaughter instructions on theories of sudden quarrel/heat of passion and imperfect self-defense.

As defendant acknowledges, two recent Court of Appeal cases are pertinent to our discussion. In *People v. Padilla* (2002) 103 Cal.App.4th 675 (*Padilla*), the defendant was charged with stabbing his prison cellmate. The Court of Appeal addressed whether the defendant was denied the opportunity to present evidence relevant to mitigating murder to voluntary manslaughter. The defendant's proffer was the testimony of two psychologists. The defendant asserted that one psychologist would testify that he hallucinated that the victim killed the defendant's father and brother. The other would testify generally as to hallucination as provocation. He argued that the testimony was relevant on a theory that he acted in the heat of passion. (*Id.* at p. 678.) The appellate court, however, rejected his claim. It concluded that that theory failed the objective test, and no perception with no objective reality, such as a delusion or hallucination, can be used to mitigate murder to voluntary manslaughter. (*Id.* at p. 679.)

In the other case, *People v. Mejia-Lenares* (2006) 135 Cal.App.4th 1437 (*Mejia-Lenares*), the Fifth Appellate District addressed the issue of whether delusion can be a basis for showing that a defendant failed to entertain malice in the context of imperfect self-defense. In *Mejia-Lenares*, the defendant asserted that he had acted in the actual belief that he needed to defend himself from imminent peril, and he claimed that he had fatally stabbed his victim because he feared the victim was transforming into the devil and wanted to kill him. (*Id.* at p. 1447.) The court held that following the decision in *Christian S.*, *supra*, 7 Cal.4th at page 783, imperfect self-defense was, in theory, a species of mistake of fact. As such, it could not be founded on delusion. (*Mejia-Lenares*, *supra*, at p. 1453, referring to fn. 3 in *Christian S.*, *supra*, 7 Cal.4th at p. 779.) The court

reasoned as follows. A “mistake of fact is predicated upon a negligent perception of facts, not, as in the case of a delusion, a perception of facts not grounded in reality. A person acting under a delusion is not negligently interpreting actual facts; instead, he or she is out of touch with reality. That may be insanity, but it is not a mistake as to any fact.” (*Mejia-Lenares, supra*, at pp. 1453-1455, fn. omitted.)

Further, the court in *Mejia-Lenares* explained that the provisions of section 28 do not authorize the use of imperfect self-defense where the basis for diminished actuality reducing murder to manslaughter rests on delusion. It considered the statutory framework regarding mental disease and defect and concluded that the Legislature has not authorized evidence of delusions to support the use of imperfect self-defense and that the existing authorities require that the defendant’s belief be “‘caused by the circumstances.’” (*Mejia-Lenares, supra*, 135 Cal.App.4th. at pp. 1454-1455, 1457.) Thus, it held that “[w]hen there are no circumstances to support the belief, the doctrine [of imperfect self-defense] does not apply.” (*Id.* at p. 1458.) The court also concluded that to hold otherwise “undercut[s] the legislative provisions separating guilt from insanity.” (*Id.* at p. 1456.)⁹

⁹ Also, in the decision in *People v. Wright, supra*, 35 Cal.4th at page 966, the California Supreme Court granted review to consider whether to extend the “doctrine of imperfect self-defense” to reduce murder to manslaughter where the defendant’s actual, though unreasonable, belief in the need to defend himself was based on delusions and/or hallucinations resulting from mental illness or voluntary intoxication, without any objective circumstances suggestive of a threat. After a study of the case, the Court did not reach that issue as it determined that the trial evidence failed to support the requested instructions. Nevertheless, in Justice Brown’s concurring opinion, she set out the statutory difficulties with the defendant’s theory. She argued that there was no logic in permitting a person to set up his own standard of conduct and in asking the jury for a compromise verdict of manslaughter because a defendant had reacted to something unreal while intoxicated with a drug. Justice Brown concluded that by urging that “[O]ne who voluntarily takes a drug that causes hallucinations of an imminent peril should not be able to kill innocent people and then claim intoxication as a defense to a murder charge. (35 Cal.4th at pp. 983-987, conc. opn. of Brown, J.) The justice pointed out that imperfect self-defense should require an aspect of objectivity or reasonableness. To permit delusion to reduce murder to manslaughter defeated the legislative intent in

Defendant argues that the decision in *Padilla* is distinguishable and urges that we reject the reasoning in *Mejia-Lenares*. However, we agree with these decisions. Based on the reasoning in *Padilla*, voluntary intoxication was not pertinent to the consideration of the existence of malice for defendant's theory of a killing upon sudden quarrel and heat of passion. Further, as to the crux of this case, the claim of unreasonable self-defense, defendant was not entitled to an instruction that his voluntary intoxication which produced paranoia and delusion, would mitigate murder to voluntary manslaughter. Accordingly, we conclude that the trial court did not err in giving a voluntary intoxication instruction that limited the jury's consideration of voluntary intoxication to the issues of deliberation and premeditation.

Even if we concluded that imperfect self-defense based on delusion can demonstrate a lack of malice, we would not reverse the judgment. With respect to sudden quarrel and heat of passion mitigating murder to manslaughter, the jury was unlikely to have fixed on this theory as a means to acquit defendant of murder. Apart from any issue of voluntary manslaughter, there was no trial evidence of adequate provocation. Consequently, the voluntary manslaughter instruction would not have misled the jury to defendant's detriment and prevented his acquittal of murder on the theory of sudden quarrel and heat of passion.

With respect to imperfect self-defense, the trial court's pinpoint instruction on imperfect self-defense summarized the issue for the defense in this case without explicitly referring to diminished actuality. It charged the jury that if it concluded that defendant "believed that Iracema Guzman had a gun, [defendant] did not have the specific intent or mental state required" for murder. If the jury followed the trial court's pinpoint

denying defendants the defense of diminished capacity. Furthermore, if imperfect self-defense is unavailable to a delusional defendant who cannot identify sufficient provocation, a defendant is not without a remedy. The defendant may invoke the defense of unconsciousness (§ 26) or insanity (§ 25, subd. (b)), if it applies. (*People v. Wright, supra*, 35 Cal.4th at p. 984.)

instruction, it would have properly considered defendant's theory of imperfect self-defense as it was framed by defense counsel. The jury would have implicitly had to consider whether defendant had an actual and honest belief that Guzman was armed. If he had that belief, it would have acquitted him. Further, the trial court gave the jury a mistake-of-fact instruction that required no reasonableness. If the jury believed defendant, this instruction also would have led it to find defendant guilty of manslaughter.

As the jury could have properly considered defendant's claim, including his claim of delusion, under the pinpoint instruction and the mistake-of-fact instruction, at best, the jury instructions were conflicting or ambiguous. In such a situation, we inquire whether the jury was "reasonably likely" to have construed the instructions in a manner that violated the defendant's rights. (*Rogers, supra*, 39 Cal.4th at p. 873.) When we examine the jury instructions as a whole and the prosecutor's and trial counsel's arguments, we find that it was unlikely that the jury was misled. Faced with the trial court's pinpoint instruction, the charge on the elements of imperfect self-defense, which does not mention malice, and an erroneous voluntary intoxication defense, we conclude that the jury would not have been confused. In determining the viability of the defense, the jury would not have appreciated the fine points of the legal theories involved. It is most likely that the jury would have resolved any inconsistency between the two instructions by following the more specific pinpoint or mistake-of-fact instruction, rather than the more general voluntary intoxication instruction.

Our conclusion is reinforced by the parties' final arguments. Trial counsel and the prosecutor agreed that the issue of guilt was essentially one of credibility. Trial counsel and the prosecutor never mentioned that defendant's mental perceptions and voluntary intoxication should not be considered in determining malice. To the contrary, the prosecutor conceded during her final comments that if the jury believed defendant's claims, it should return a verdict of manslaughter, not murder. The comments of counsel reinforce this court's conclusion that the jury gave full consideration to the defense,

which was grounded on delusion and voluntary intoxication, during trial. Based on the instructions and record as a whole, we also conclude that the jury's decisions must have necessarily rested on a rejection of defendant's credibility, and not on any erroneous instruction on voluntary manslaughter.

Further, we reject appellant's alternative claim of ineffective trial counsel. As we explain above, the trial court's jury instructions afforded defendant a full consideration of his defense as it was framed during the trial. In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.) Any failure by trial counsel to request "appropriate" jury instructions fails, as defendant was not entitled to an instruction on the consideration of voluntary intoxication as to malice. Further, even if we concluded that the voluntary intoxication instruction was erroneous, it did not play a role in the jury's proper consideration of the defense evidence. Where a defendant fails to establish either prong of the test for ineffective trial counsel, the existence of the other prong is moot, and the claim may be disposed of based on the conclusion on the one prong. (*Strickland v. Washington* (1984) 466 U.S. 668, 697.)

III. The Sentencing Issue

Defendant contends that the facts underlying the offense and the section 12022.53, subdivisions (c) and (d) enhancements were essentially the same. He argues that consequently, under the doctrine of merger in *People v. Ireland* (1969) 70 Cal.2d 522 (*Ireland*) and pursuant to sections 654 and 954, the enhancements must be stricken.

We disagree.

In *People v. Sanders* (2003) 111 Cal.App.4th 1371 (*Sanders*), the defendant raised the same contention. The *Sanders* court observed that in *Ireland*, the Supreme Court held that the felony-murder rule could not be applied when the underlying felony is an assault.

It explained that the assault is an integral part of the homicide, and to hold otherwise would relieve the prosecution of the need to prove malice, as most homicide cases involve assault. (*Ireland, supra*, 70 Cal.2d at p. 539.) The *Sanders* court observed that the Supreme Court has not applied the doctrine other than in the context of felony murder and assault, and the doctrine has no application to enhancements. (*Sanders, supra*, 111 Cal.App.4th at p. 1374.)

That court also explained that with respect to multiple punishment, three previous decisions have held that the use of the section 12022.53, subdivisions (c) and (d) enhancements in a murder case do not amount to multiple punishment: *People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1314, *People v. Myers* (1997) 59 Cal.App.4th 1523, 1529, and *People v. Ross* (1994) 28 Cal.App.4th 1151, 1157-1159. (*Sanders, supra*, 111 Cal.App.4th at p. 1375.) The *Sanders* court said: “[S]ection 654 does not bar imposition of a single firearms use enhancement to an offense committed by the use of firearms, unless firearms use was a specific element of the offense itself. Indeed, where imposition of a firearms use enhancement is made *mandatory* notwithstanding other sentencing laws and statutes, it is error to apply section 654 to stay imposition of such an enhancement.” (*Sanders*, 111 Cal.App.4th at p. 1375, quoting, *People v. Hutchins*, 90 Cal.App.4th at p. 1314.)

We agree with the decision in *Sanders*.

In this appeal, defendant additionally attempts to bolster the argument made in *Sanders* with an assertion that the decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and *People v. Seel* (2004) 34 Cal.4th 535 (*Seel*) support his claim. He argues that these decisions show that conduct enhancements are subject to the same statutory and procedural due process constraints governing the pleading, proof and imposition of sentence on offenses, including sections 654 and 954, and for that reason, the decision in *Sanders* warrants further consideration.¹⁰

¹⁰ Section 654 states in pertinent part: “(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that

In *Apprendi*, the Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (*Apprendi, supra*, 530 U.S. at p. 490.) The Court’s reasoning was this: The federal Constitution requires the elements of a crime to be proved beyond a reasonable doubt because they expose the defendant to punishment; likewise, the elements of a sentence enhancement must be proved beyond a reasonable doubt if there is exposure to increased punishment. (*Id.* at pp. 474-476, 482-484.)

In *Seel*, the California Supreme Court equated the *Apprendi* definition of an offense for Sixth Amendment purposes -- the underlying elements of the crime plus the elements of the enhancement -- to define the offense for the purpose of applying the federal double jeopardy clause. The Court then held that the federal double jeopardy clause should apply to the offense and its enhancement as a whole. Thus, where there was an appellate finding of evidentiary insufficiency with respect to the elements of the enhancement, a retrial on the premeditation allegation (§ 644, subd. (a)) -- part of the offense -- was precluded on federal double jeopardy grounds. (*Seel, supra*, 34 Cal.4th at pp. 547-548.)

provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.”

Section 954 provides: “An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court; provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately. An acquittal of one or more counts shall not be deemed an acquittal of any other count.”

We find no logic in the *Seel-Apprendi* attempt to bolster the argument in *Sanders*. The *Seel* decision does nothing to assist defendant's merger claim. Moreover, *Seel* does not implicate the reasoning in *Sanders* or add weight to the arguments made in that case. The provisions in sections 654 and 954 do not require that where there is a dual use of facts underlying an offense and its enhancement that the enhancement cannot apply.¹¹

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.
BOREN

We concur:

_____, J.
DOI TODD

_____, J.
CHAVEZ

¹¹ We note that the California Supreme Court has granted review in several cases raising issues regarding the relationship of sentence enhancements to substantive offenses. (See *People v. Sloan* (S132605), review granted June 8, 2005 [for purposes of ban on conviction of necessarily included offenses, should enhancement allegations be considered in determining when a lesser offense is necessarily included in a charged offense as pleaded]; *People v. Izaguirre* (S132980) review granted June 8, 2005 [whether enhancements should be considered in applying the ban on multiple convictions and multiple punishment, and whether a section 12022.53, subdivision (d) enhancement is necessarily included within the conviction for first degree murder with a drive-by shooting special circumstance]; *People v. Palacios* (S132144), review granted May 11, 2005 [whether section 654 should be applied to multiple firearm enhancements].)